

9 A.D.3d 389, 780 N.Y.S.2d 620, 2004 N.Y. Slip Op. 06023
(Cite as: 9 A.D.3d 389)

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Supreme Court, Appellate Division, Second
Department, New York.
Jules HOFFMAN, respondent-appellant,
v.
Cheryl UNTERBERG, et al.,
appellants-respondents.
July 12, 2004.

Background: Owner of limited liability company (LLC) that owned unsold condominium units brought action against co-owner, real estate management company, and management company's owner, seeking, inter alia, to recover damages for conversion. The Supreme Court, Queens County, Dye, J., denied parties' cross-motions for summary judgment, and parties cross-appealed.

Holdings: The Supreme Court, Appellate Division, held that:

1(1) genuine issue of material fact existed as to whether terms of note co-owner gave to owner, in payment of 24% interest in company, were reasonable, precluding summary judgment, and

2(2) genuine issue of material fact existed as to whether owner accepted co-owner's exercise of option nevertheless, precluding summary judgment.

Affirmed.

West Headnotes

[1] Judgment 228 ⇐ 181(31)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases

228k181(31) k. Stock and Stockholders, Cases Involving. Most Cited Cases
Genuine issue of material fact existed as to whether terms of note given to owner of limited liability company (LLC) by co-owner, in payment for option of 24% interest in LLC, were reasonable, precluding summary judgment on owner's claim for declaratory judgment that option was invalid.

[2] Judgment 228 ⇐ 181(31)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(31) k. Stock and Stockholders, Cases Involving. Most Cited Cases
Genuine issue of material fact existed as to whether owner of limited liability company (LLC) accepted co-owner's exercise of option by accepting her prepayments before notifying her, more than two months after she exercised option, that he was rejecting it, precluding summary judgment on owner's claim for declaratory judgment that option was invalid.

620 Ganfer & Shore, LLP, New York, N.Y. (Steven J. Shore and Alan C. Fried of counsel), for appellants-respondents Cheryl Unterberg and David Unterberg and Firestone & Harris, Brooklyn, N.Y. (Alan J. Firestone of counsel), for appellant-respondent621 Alayne Real Estate, Inc. (one brief filed).
Richard M. Gabor, Staten Island, N.Y., for respondent-appellant.

MYRIAM J. ALTMAN, J.P., HOWARD MILLER, SANDRA L. TOWNES, and STEVEN W. FISHER, JJ.

*389 In an action, inter alia, to recover damages for conversion, the defendants appeal, as limited by their brief, from so much of an order of the

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Supreme Court, Queens County (Dye, J.), dated July 17, 2003, as denied their cross motion for summary judgment dismissing the sixth cause of action and for summary judgment on the seventh cause of action for a declaratory judgment in favor of the defendant Cheryl Unterberg, and the plaintiff cross-appeals, as limited by his brief, from so much of the same order as denied those branches of his motion which were for summary judgment on the sixth and seventh causes of action.

ORDERED that the appeal from so much of the order as denied that branch of the cross motion which was for summary judgment dismissing the sixth cause of action is dismissed as academic, without costs or disbursements; and it is further,

ORDERED that the cross appeal from so much of the order as denied that branch of the motion which was for summary judgment on the sixth cause of action is dismissed as academic, without costs or disbursements; and it is further,

ORDERED that the cross appeal from so much of the order as denied that branch of the motion which was for summary judgment*390 on the seventh cause of action insofar as asserted against the defendants David Unterberg and Alayne Real Estate, Inc., is dismissed as academic, without costs or disbursements; and it is further,

ORDERED that the order is affirmed insofar as reviewed, without costs or disbursements.

In our decision and order in a companion appeal (*see Hoffman v. Unterberg*, 9 A.D.3d 386, 780 N.Y.S.2d 617 [decided herewith]), this court, inter alia, dismissed the plaintiff's sixth cause of action. Consequently, the appeal and cross appeal from so much of the order as denied those branches of the motion and cross motion which were for summary judgment on that cause of action are academic.

The background of this action is set forth in our decision and order in the companion appeal. At issue on this appeal and cross appeal is the plaintiff's seventh cause of action, which seeks a judgment declaring, inter alia, that an option granted to the defendant Cheryl Unterberg to

purchase 24% of Setam Realty Associates, LLC (hereinafter Setam), a limited liability company, was invalid. In the decision and order in the companion appeal, we dismissed that cause of action insofar as asserted against the defendants David Unterberg and Alayne Real Estate, Inc., and therefore the cross appeal as to those two defendants with respect to the seventh cause of action is also academic.

While the plaintiff alleged in his second amended complaint, among other things, that the agreement granting Cheryl Unterberg the 24% option was a forgery, he abandoned that claim when he moved for summary judgment. As to his remaining claims, there is no merit to his contentions that Cheryl Unterberg renounced the option when she renounced her inheritance, that the option lacked the essential terms of an enforceable contract, and that the option lapsed before it was exercised. Further, even assuming that the plaintiff had the right to revoke the option as he contends, an issue we need not reach, his conclusory and unsupported assertion that **622 he revoked the option before Cheryl Unterberg exercised it was insufficient to demonstrate his entitlement to summary judgment or to raise a triable issue of fact in opposition to the cross motion for summary judgment (*see Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255, 259, 309 N.Y.S.2d 341, 257 N.E.2d 890; *Leshowitz v. Conklin*, 245 A.D.2d 343, 344, 665 N.Y.S.2d 593).

[1] However, there exists a triable issue of fact as to the reasonableness of the terms of the note given by Cheryl Unterberg in payment of the 24% interest in Setam. The option provided that the purchase price could be paid by "a note bearing interest at the mid-term federal rate as announced under *391 Internal Revenue Code section 1274 and with terms reasonably acceptable to the Grantor." The promissory note executed by Cheryl Unterberg was for a nine-year term and provided that it was not negotiable and could not be assigned or transferred. The plaintiff contends that such terms were not reasonable given his advanced age. There is a question of fact as to whether the terms of the note were reasonable under the circumstances. However, contrary to the plaintiff's contention, the

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terms were not unconscionable (*see Gillman v. Chase Manhattan Bank*, 73 N.Y.2d 1, 10, 537 N.Y.S.2d 787, 534 N.E.2d 824).

[2] In addition, there is a question of fact as to whether the plaintiff, nevertheless, accepted Cheryl's Unterberg's exercise of the option by accepting certain prepayments under the note before notifying her, more than two months after she exercised the option, that he was rejecting it.

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